Filed 1/16/19 P. v. Morris CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PIERRE LAKELL MORRIS, Defendant and Appellant.	B283044 (Los Angeles County Super. Ct. No. BA451577)

APPEAL from a judgment of the Superior Court of Los Angeles County, Renee Korn, Judge. Affirmed in part, vacated in part, and remanded with instructions.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Pierre Lakell Morris of rape, kidnapping to commit rape, assault, three counts of kidnapping, and two counts of second degree robbery. The trial court sentenced appellant to a term of 130 years to life in state prison. On appeal, appellant asserts evidentiary errors, instructional error, and prosecutorial misconduct. He also contends that the evidence was insufficient to support several of his convictions and sentence enhancements. Finally, he argues that we should remand for the trial court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) whether to strike a firearm enhancement.

We vacate the sentence and remand the matter for the trial court to exercise its discretion whether to strike the firearm enhancement. We otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *The Charges*

The Los Angeles County District Attorney charged appellant with: kidnapping G.N. and Emma L. to commit rape (Pen. Code, § 209, subd. (b)(1))[1]; assault of G.N. with intent to rape (§ 220, subd. (a)(1)); rape of Emma (§ 261, subd. (a)(2)); kidnapping David R. and Marcos C. (§ 207, subd. (a)); and second degree robbery of David and Marcos (§ 211). The information also alleged that the crimes were

---

[1] Undesignated statutory references are to the Penal Code.

gang-related under § 186.22, subdivision (b)(1), and included several firearm allegations under section 12022.53.

B. *Evidence at Trial*

1. *The Crimes at Central Spa*

On the evening of September 18, 2016, G.N., Emma L., and Marcos C. were working at the Central Spa, on the second floor of the building at North Vermont Avenue in Los Angeles. At trial, the prosecution and the defense agreed that Central Spa was a known place of prostitution. G.N., Emma, and Marcos claimed they were there to clean. Sometime between 9:00 and 9:30 p.m., a man entered the spa, posing as a customer. At trial, the victims identified the man as appellant. Moments later, another man, later identified as Jared Santiago, entered the spa holding a gun. Santiago pushed Marcos to the ground, tied his hands, and covered his head with a towel.

Emma and G.N. locked themselves in the bathroom, but appellant broke the door open, directed them to a "living room" at the front of the spa, and told them to get on the floor. Appellant and Santiago then covered the women's heads with a blanket. After Marcos was brought into the same room as the women, appellant and Santiago took his wallet and keys. The men then took G.N.'s purse and began ransacking the spa.

At some point, appellant took G.N. and Emma to a large space in the back of the spa. He then took G.N. to a small room, leaving Emma alone with Santiago. Appellant

began touching G.N. all over her body and tried to pull down her pants, but after G.N. told appellant she had AIDS, he stopped and left the room. Meanwhile, Santiago took Emma to one of the spa's private rooms, forced her to undress, and raped her. Either appellant or Santiago then moved Marcos to the bathroom.

At around 9:30 p.m., David R. arrived at the spa. When the prosecutor asked David if he was seeking sexual favors there, he responded, "Not necessarily." David tried to open the door, but it was chained. Appellant opened the door, and David entered. None of the other victims were in sight. Santiago then approached David, ordered him to the ground, tied his hands, and took his wallet and car keys. He then moved David to the bathroom, next to Marcos.

Eventually, appellant and Santiago left the spa. G.N. exited the room she was in, saw David in the bathroom, and led him out of the building. Outside, David saw Santiago drive away in David's car. Emma left the room she was in and freed Marcos. Emma and G.N. called the police. David left the scene before officers arrived. Later that night, he went to the police station with his daughters and reported that he had been carjacked. At trial, he explained that he had been embarrassed to admit he went to the spa.

That same night, police found David's car and saw Santiago next to it. Santiago tried to escape, but officers apprehended him. Police brought David to the scene, and he identified Santiago as one of the perpetrators. Inside the car

were flat-screen monitors that had not been there before it was stolen.

2. *Identification of Appellant*

After the crimes, the victims provided descriptions of the perpetrators to the police. At least one victim described one of the perpetrators as a younger Hispanic man and the other as an older black man. David, G.N., and Marcos later identified appellant as the black perpetrator in a photo lineup. Emma identified Santiago but was unable to identify the Black perpetrator in a photo lineup. All four victims identified appellant at trial.

3. *GPS Data*

Appellant was wearing a global positioning satellite (GPS) ankle monitor on the night of the crimes. Parole Agent Gabriel Rogers, of the California Department of Corrections and Rehabilitation, testified about data from appellant's ankle monitor. The data showed that appellant arrived at the building in which the spa was located at 9:05 p.m., and left at 10:40 p.m. After leaving the spa, appellant travelled to the same area where police found Santiago with David's car.

4. *Uncharged 2009 Robbery*

In 2009, Patricia G. posted a newspaper ad for a "casual encounter[]." A man contacted her and arranged to come to her home. At trial, when the prosecutor asked if she

was to be paid for having sex, Patricia replied, "Well, we had to get to know each other to know if we were going to or not." When the man arrived at her home, Patricia's two roommates, Karen and Elly, were also there. The man entered, pulled out a gun, and ordered Patricia to undress. After Patricia complied, the man then opened the door to allow another man into the home. At trial, when the prosecutor asked if that second man was in court, Patricia stated, "I think it's [appellant] . . . ."

Appellant and his accomplice directed Patricia and her two roommates into a bedroom. Once there, they ordered Elly to undress, and she complied. After Karen started crying, appellant placed her against the wall and cut her dress off with a knife. Appellant and his accomplice bound the women and covered their faces with curtains. The men then ransacked the home, taking televisions, jewelry, and other valuables. The trial court instructed the jury that it could consider the evidence only to determine whether appellant "acted with the intent to commit the crimes alleged" or "had a plan or scheme to commit the crimes . . . ."

5. *Gang Evidence*

Los Angeles Police officers testified at trial that both appellant and Santiago were admitted members of the 18th Street gang. Officer Daniel Rodriguez testified as the prosecution's gang expert. He explained that 18th Street was a "very violent gang" known for murders, robbery, and

other crimes. The gang extorted and "tax[ed]" vendors within areas it controlled.

In response to a hypothetical tracking the facts of the crimes at Central Spa, Rodriguez opined that the offenses were committed in association with and for the benefit of the gang. He explained that members of 18th Street commonly targeted prostitutes and illegal businesses because such victims were less likely to report the crimes. He also stated that members who target such individuals or locations "take" sexual favors as a form of "taxation." According to Rodriguez, Central Spa was outside 18th Street's territory, on the edge of territory claimed by one of its chief rivals. He opined that committing a crime in rival territory increased the gang's status. He also explained that committing crimes with a younger gang member benefitted the gang by training the younger member.

C. *Verdict and Sentence*

Following trial, the jury found appellant guilty of all charges except those relating to G.N. (kidnapping to commit rape and assault with intent to commit rape). As to those charges, the jury found him guilty of the lesser included offenses of kidnapping and simple assault. The jury found several firearm allegations to be true and several others to be untrue. It deadlocked on one of the firearm allegations, and the court dismissed that allegation. Finally, the jury found all but one of the gang allegations to be true.

Following a bench trial, the trial court found that appellant had suffered two prior strike convictions. The court sentenced appellant to 130 years to life in state prison, which included a consecutive term of ten years for one of the firearm enhancements. This appeal followed.

DISCUSSION

A. *Evidentiary Challenges*

Appellant challenges the admission of testimony about his parole status and the 2009 robbery. He claims the trial court's failure to exclude this evidence constituted an abuse of discretion and violated his constitutional right to due process.

We review state-law challenges to a trial court's evidentiary rulings for abuse of discretion. (See *People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) "Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Ibid.*) A miscarriage of justice results only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

As for constitutional challenges, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally

unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 439, italics omitted.) We consider appellant's challenges in turn.

1. *Evidence of Appellant's Parole Status*

a. Background

At the time of the crimes, appellant was on parole and was wearing a GPS monitor as part of the conditions of his parole. Prior to trial, the parties discussed the introduction of GPS data into evidence. Defense counsel conceded that the GPS data was admissible evidence but was worried that its introduction would reveal appellant's parole status to the jury. The trial court agreed that evidence of appellant's parole status had no probative value. It therefore precluded the prosecution from eliciting testimony that appellant was on parole. Nevertheless, both the court and defense counsel acknowledged that it was unavoidable that the jury would realize appellant was on parole at the time of the crimes.

In his opening statement, defense counsel acknowledged that appellant was "not a saint" and was wearing a GPS monitor at the time of the crimes, placed on him by the "Department of Corrections." Later at trial, Officer Paul Quintana testified about his encounter with appellant during a traffic stop on September 1, 2016, two and a half weeks before the crimes. In his testimony, Quintana stated, without objection, that appellant was on parole at the time of their encounter. During an unrelated sidebar, the court expressed concern about Quintana's mentioning of appellant's parole status, and asked defense

counsel if he wanted a limiting instruction. Counsel responded, "No. I don't care about that right now. I think that's going to come in." Agent Rogers subsequently testified about the data from appellant's GPS monitor. At the start of his testimony, Rogers identified himself as a parole agent.

b. Analysis

On appeal, appellant claims the trial court reversibly erred in failing to strike Quintana's testimony about his parole status. Respondent argues that appellant has forfeited this claim by failing to object to the testimony and by declining a limiting instruction. Rather than merely forfeit a challenge to Quintana's testimony about his parole status, we conclude that appellant has waived such a challenge through defense counsel's exchange with the trial court.

As noted, defense counsel did not object after Quintana testified that appellant was on parole at the time of the traffic stop. In response to the trial court's concern about this testimony, defense counsel not only declined a limiting instruction, but also disclaimed any objection to the testimony, stating that he did not "care" about parole status because he thought it was "going to come in." Appellant has therefore waived any objection to the contested testimony. (See, e.g., *People v. Robertson* (1989) 48 Cal.3d 18, 44 ["Defendant, having withdrawn his objection to the evidence, cannot now complain of its admission"].)

Moreover, regardless of waiver, Quintana's testimony about appellant's parole status was harmless, as the jury almost certainly would have known that appellant was on parole at the time of the crimes even without it. Defense counsel's opening statement all but conceded that appellant was on parole, stating he was "not a saint" and was wearing a GPS monitor placed on him by the "Department of Corrections . . . ." And any doubt in the jurors' minds about appellant's parole status would have dissipated after Rogers's testimony (which appellant does not challenge), in which Rogers identified himself as a parole agent and went on to relay and explain the data from appellant's GPS monitor.

Given these strong indications that appellant was on parole at the time of the crimes, there is no reasonable probability that Quintana's testimony influenced the verdict. (See *Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Lewis and Olive* (2006) 39 Cal.4th 970, 1029 [no prejudice where contested comments "added nothing to what the jury knew"]; *People v. Long* (1957) 152 Cal.App.2d 716, 722 [no prejudice from trial court's reference to defendant's parole status where "the fact of parole was well known to the jury"].) Accordingly, the trial court did not err in failing to strike the testimony.

2. *Evidence of the 2009 Robbery*

a. Background

As noted, at trial, Patricia testified about the 2009 robbery and said she thought appellant was one of the robbers. Prior to trial, appellant moved to exclude evidence of the 2009 robbery. Among other things, he argued that the prior crime was not sufficiently similar to the current offenses to be probative of any material issue, and that the evidence was unduly prejudicial. Appellant conceded that the court should not consider the prior crime too remote in time, given that appellant was in prison for about seven years between the 2009 robbery and the 2016 crimes at Central Spa.

The trial court denied the motion to exclude the evidence. It found the evidence relevant to "intent" and the existence of a "common plan," and therefore limited its admissibility to those matters. The court also concluded the evidence was not unduly prejudicial. Though the court did not specify the "intent" the evidence could serve to prove, its discussions with the parties suggest its focus was appellant's intent to commit sex offenses, as relevant to the charges of rape, kidnapping to commit rape, and assault with intent to commit rape.

b. Analysis

On appeal, appellant argues the trial court's failure to exclude evidence of the 2009 robbery constituted an abuse of its discretion under Evidence Code sections 1101 and 352

and violated his constitutional right to due process. "[Evidence Code section 1101, subdivision (a),] prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).)

One matter, relevant here, for which evidence of uncharged misconduct may be used is proof of the defendant's intent.[2] (See *Ewoldt, supra,* 7 Cal.4th at p. 402.)

---

[2] As noted, the trial court also ruled evidence of the 2009 robbery admissible as evidence of a "common plan." "Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined . . . .' [Citation.]" (*Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Because we conclude that the trial court did not abuse its discretion in ruling the evidence admissible to prove appellant's intent, and given that appellant does not contest the occurrence of the crimes on appeal, we need not consider whether evidence of the 2009 robbery was admissible to establish a common plan. (Cf. *People v. Yeoman* (2003) 31 Cal.4th 93, 122 (*Yeoman*) [no possible prejudice from admitting evidence of prior crime to prove identity where same evidence was properly admitted to show intent and defendant conceded identity was not "'seriously questioned'"].)

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ibid.*)

If the evidence of uncharged misconduct is sufficiently similar to the charged crimes to be relevant to the defendant's intent, the trial court must consider whether, under Evidence Code section 352, the probative value of the evidence is substantially outweighed by its prejudicial effect. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328 (*Foster*).) We review rulings under Evidence Code sections 1101 and 352 for abuse of discretion. (*Foster, supra,* at p. 1328.) Under this standard, "'a trial court's ruling will not be disturbed . . . unless [it] exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Appellant contends that the evidence of the 2009 robbery was not relevant to his intent for purposes of Evidence Code section 1101 and was unduly prejudicial for purposes of Evidence Code section 352. As to relevance, appellant claims the 2009 robbery lacked sufficient similarities to the current crimes. We disagree. In both incidents, appellant, together with an accomplice, committed robberies targeting prostitutes, entered the location after one of the men posed as a customer, covered the victims' faces, moved them, and committed offenses of a sexual nature against them. The similarities in the crimes were

sufficient to support an inference that appellant harbored a similar intent in each instance: to subject the victims to unwanted acts of a sexual nature. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 122 [defendant's use of "good Samaritan ploy" to rob stranded female motorists was similar enough to support inference that he harbored similar intent in both instances].)

Appellant challenges the conclusion that he targeted prostitutes in both instances, asserting that Patricia did not testify to being a prostitute and noting that Emma and G.N. testified they were only cleaning at the spa. But Patricia tacitly acknowledged she intended to receive payment for the planned sexual encounter. And David's testimony that he was "[n]ot necessarily" seeking sexual favors at Central Spa and was embarrassed about going there suggested the business was known to provide such services. The jury could therefore reasonably infer that by targeting Central Spa, appellant intended to target prostitutes, regardless of whether Emma and G.N. were prostitutes themselves. Accordingly, the trial court did not abuse its discretion in concluding that Evidence Code section 1101 did not preclude admission of evidence of the 2009 robbery.

Nor did the court abuse its discretion in finding that the risk of unfair prejudice did not substantially outweigh the probative value of the evidence. While the 2009 robbery did not involve rape, as we explain in the section discussing the sufficiency of the evidence, evidence that appellant contemplated the commission of sexual offenses supported

an inference that Santiago's commission of rape was reasonably foreseeable to appellant, rendering appellant guilty of rape as an aider and abettor of Emma's kidnapping. (See *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*) [an aider and abettor is guilty of any offense that was "'a reasonably foreseeable consequence'" of the crime aided and abetted].)

Appellant argues that the evidence lacked probative value because Patricia said, "I think," when she identified appellant at trial. Patricia's degree of certainty, however, was a matter for the jury to consider. A jury may consider otherwise admissible evidence of uncharged crimes "so long as it finds 'by a preponderance of the evidence' that the defendant committed those other crimes." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1224, fn. 14.) Patricia's identification of appellant was sufficient to allow the jury to make that finding. (See *People v. Leon* (2015) 61 Cal.4th 569, 595, 599 [evidence of prior crimes admissible where eyewitness identifying defendant as perpetrator of those crimes expressed uncertainty].)

Next, appellant contends that the 2009 robbery was so remote in time from the 2016 crimes at Central Spa that an inference of similar intent was "weaken[ed]." Initially, we note that appellant has forfeited this contention by conceding below that the two incidents should not be considered remote in time. (See *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 ["arguments raised for the first time on appeal are generally deemed forfeited"].) Regardless

of forfeiture, however, because appellant was incarcerated during almost the entire time between the two incidents, the passage of time between them did not affect the probative value of the evidence. (See *Foster*, *supra*, 50 Cal.4th at p. 1330 [rejecting claim that passage of time between incidents reduced probative value of the evidence because defendant was incarcerated for much of that time].)

Finally, appellant claims that the 2009 robbery, in which he physically removed the dress of one of the victims, was more inflammatory than the crimes at Central Spa, in which Santiago was the one who raped Emma. The opposite is true. Even putting aside the inflammatory nature of Emma's rape, the evidence showed appellant groped intimate parts of G.N.'s body, tried to remove her pants, and stopped only after she told him she had AIDS. In comparison to these acts, the 2009 robbery was not inflammatory.

In short, the trial court did not abuse its discretion in denying appellant's motion to exclude evidence of the 2009 robbery. Appellant's constitutional claim similarly fails. (See *Foster*, *supra*, 50 Cal.4th at p. 1335 ["because the evidence was relevant to prove a fact of consequence, its admission did not violate defendant's due process rights"].)

Additionally, even if admitting the evidence were an abuse of discretion, such error would have been harmless. First, the court instructed the jury on the limited admissibility of evidence of the 2009 robbery, "thereby 'minimizing the potential for improper use.'" (*Foster*, *supra*,

50 Cal.4th at p. 1332.) Further, evidence that appellant was one of the perpetrators of the crimes at Central Spa was overwhelming: all four victims identified him at trial, and data from appellant's GPS monitor showed he was at or near the spa at the time of the crimes and then travelled to the same area in which police found Santiago with stolen property. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1131-1132 [any error in admitting evidence of prior crime was harmless because the evidence of guilt was overwhelming].) Finally, the jury's verdict -- finding appellant guilty of lesser included crimes in the charges relating to G.N. and finding several enhancement allegations not true -- dispels any notion that the jury convicted appellant based on bias or passion. (Cf. *People v. Roberts* (1992) 2 Cal.4th 271, 328 [jury's discrimination between charges in its penalty verdict showed it was not swayed by improper factors].)

B. *Sufficiency Challenges*

Appellant contests the sufficiency of the evidence to support his convictions for kidnapping, kidnapping to commit rape, and rape, and the gang enhancements. In assessing the sufficiency of the evidence to support a conviction, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The same standard applies to the sufficiency of the evidence to support an enhancement. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).) We discuss each of appellant's sufficiency challenges in turn.

1. *Kidnapping*

Appellant was convicted of kidnapping G.N., David, and Marcos. Section 207, subdivision (a), provides: "Every person who forcibly . . . steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county, is guilty of kidnapping." Although the statute does not expressly include a distance requirement, our Supreme Court "has long recognized . . . that the movement, or asportation, of the victim must be 'substantial in character,' not slight or trivial [citation] . . . ." (*People v. Brooks* (2017) 3 Cal.5th 1, 68.) Appellant argues the evidence was insufficient to establish that his movement of the victims was substantial.

In determining whether substantial movement occurred, a jury must consider "the totality of the circumstances." (*People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*).) Appropriate considerations include "not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape

and the attacker's enhanced opportunity to commit additional crimes." (*Ibid.*)

"In addition, in a case involving an associated crime, the jury [must] consider whether the distance a victim was moved was incidental to the commission of that crime . . . ."[3] (*Martinez*, *supra*, 20 Cal.4th at p. 237.) Whether the movement was merely incidental to the commission of associated crimes depends on "the context of the environment in which the movement occurred." (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) Movement is not merely incidental to the associated crime if it is "neither part of nor necessary to" its commission. (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169 (*Shadden*).)

Applying these factors here, we conclude that the evidence was sufficient to support the jury's finding that appellant's movement of G.N., Randel, and Marcos was substantial. All three of these victims were at some point at the front of the spa. Appellant and Santiago later moved each of them to either the bathroom or another room, reducing the likelihood of detection or escape and enhancing their ability to commit additional crimes, such as appellant's assault of G.N. (See *Martinez*, *supra*, 20 Cal.4th at p. 237; *People v. Delacerda* (2015) 236 Cal.App.4th 282, 295 (*Delacerda*) [jury could reasonably infer that movement from

---

[3] An associated crime "is any criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will." (*People v. Bell* (2009) 179 Cal.App.4th 428, 430.)

front of apartment to bedroom closet enhanced opportunity to commit additional crimes and was meant to decrease likelihood of detection]; *People v. Robertson* (2012) 208 Cal.App.4th 965, 985 (*Robertson*) ["By moving the victim away from the back door, appellant reduced the possibility that the victim could escape"].)

Appellant notes that the entrance to the spa was on the second floor of the building and that the door was chained, suggesting that the victims were hidden from public view even before he moved them, and thus that the movement did not decrease the likelihood of detection. However, moving the victims from the front of the spa made it less likely that persons attempting to enter would hear the victims if they screamed for help. (See *Robertson*, *supra*, 208 Cal.App.4th at p. 985 [moving victim away from locked door decreased likelihood of detection because "it was less likely that [her son] could have heard his mother if she had screamed for help"].)

Appellant contends that his movement of the victims was merely incidental to the commission of the robberies. But appellant and Santiago moved each victim after taking their personal belongings. This movement was unnecessary to the robberies and thus cannot be considered merely incidental to them. (See *People v. James* (2007) 148 Cal.App.4th 446, 455, fn. 6 (*James*) ["a movement unnecessary to a robbery is not incidental to it at all"]; *People v. Leavel* (2012) 203 Cal.App.4th 823, 835 [movement of victim from kitchen to bedroom not incidental to robbery

where defendant had already taken the contents of her purse and did not need her assistance to obtain additional property from the bedroom].)

Nor was appellant's movement of G.N. merely incidental to her assault, as the movement was unnecessary to complete the crime. (Cf. *Shadden*, *supra*, 93 Cal.App.4th at p. 169 ["Where a defendant drags a victim to another place, and then attempts a rape, the jury may reasonably infer that the movement was neither part of nor necessary to the rape"].) Accordingly, the evidence was sufficient to support appellant's kidnapping convictions.

2. *Kidnapping to Commit Rape*

Appellant was convicted of kidnapping Emma to commit rape under section 209, subdivision (b), either directly or as an aider and abettor.[4] Like simple kidnapping, kidnapping to commit rape has an asportation requirement. (*People v. Bell, supra,* 179 Cal.App.4th at p. 435.) The standard for proving that element is different, however. (*Ibid.*) The asportation requirement of kidnapping to commit rape has two prongs. First, the defendant's movement of the victim must not be "merely incidental to the [rape]." (*Martinez*, *supra*, 20 Cal.4th at p. 232.) Second,

---

[4] Appellant does not contest the sufficiency of the evidence to establish that he possessed the requisite mens rea for kidnapping to commit rape. We therefore do not address that issue. (See *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 395 [issue not briefed is forfeited].)

the movement must increase "the risk of harm to the victim over and above that necessarily present in the [rape]." (*Ibid.*)

Appellant conclusorily asserts that Emma's movement was merely incidental to the rape. However, the evidence was sufficient to support the jury's contrary finding. Appellant and Santiago moved Emma from the front of the spa to the back, and Santiago then took her to a private room, where he raped her. Because this movement was unnecessary to the commission of the rape, a jury could reasonably conclude that it was not merely incidental to it. (See *Shadden*, *supra*, 93 Cal.App.4th at p. 169; *People v. Salazar* (1995) 33 Cal.App.4th 341, 347 [movement of victim into motel room not incidental to rape because defendant could have raped victim "on the walkway outside the motel room door and avoided moving her at all"].)

Next, appellant contends that the movement did not increase the risk of harm to Emma because she was moved only within the spa. However, "[t]here is no rigid 'indoor-outdoor' rule by which moving a victim inside the premises in which he is found is *never* sufficient asportation . . . ." (*James*, *supra*, 148 Cal.App.4th at p. 456.) As with the movement of the other victims, Emma's movement from the front of the spa to the back decreased the likelihood of detection or escape and provided appellant and Santiago a greater opportunity to commit additional crimes against her. (See *Martinez*, *supra*, 20 Cal.4th at p. 237; *Delacerda*, *supra*, 236 Cal.App.4th at p. 295; *Robertson*, *supra*, 208 Cal.App.4th

at p. 985.) Accordingly, substantial evidence supported appellant's conviction for kidnapping to commit rape.

3. *Rape*

The jury convicted appellant of Emma's rape under a theory of aiding and abetting. "An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*People v. Chiu* (2014) 59 Cal.4th 155, 161, italics omitted, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560.) Under section 31, "a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*), italics omitted.)

An aider and abettor is guilty, however, "not only of the intended crime, but also '[of] any other offense that was a "natural and probable consequence" of the crime aided and abetted.'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, quoting *Prettyman*, *supra*, 14 Cal.4th at p. 260.) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" (*Medina*, *supra*, 46 Cal.4th at p. 920, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535 (*Nguyen*).) "[T]o be reasonably foreseeable '[t]he

consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .'" (*Nguyen*, *supra*, at p. 535.)

The trial court instructed the jury on both theories of aider and abettor liability. As to Emma's rape, it directed the jury to find appellant guilty if it found either that he aided and abetted the rape, or that he aided and abetted the kidnapping to commit rape and rape was a natural and probable consequence. Appellant argues that the evidence was insufficient to prove that he possessed the requisite intent. He asserts that there was no evidence he knew Santiago would rape Emma, and notes that he did not help Santiago take Emma to the private room and was not present during the crime.

However, ample evidence supported the jury's verdict. Appellant and Santiago targeted a location known for prostitution. Officer Rodriguez testified that gang members who target such locations "take" sexual favors as a form of "taxation." From this evidence, the jury could reasonable infer that appellant and Santiago planned to sexually assault women at Central Spa, and thus that the commission of rape was, at the very least, reasonably foreseeable to appellant. (See *Nguyen*, *supra*, 21 Cal.App.4th at p. 533 [sexual assault reasonably foreseeable where "defendants and their cohorts chose to commit robberies in businesses with a sexual aura"].)

Inside, appellant separated Emma and G.N. from Marcos. Appellant proffers no explanation for separating

the women, and we see no apparent purpose other than to facilitate their sexual assault. (Cf. *People v. Lopez* (1981) 116 Cal.App.3d 882, 885 [defendant moved the victim's husband over on the bed, showing that he knew of his companion's intent to rape her].) Appellant then took G.N. to one of the rooms, leaving Santiago alone with Emma. In that room, appellant sexually assaulted G.N., tried to remove her pants, and stopped only after she told him she had AIDS. During that time, Santiago took Emma to a private room, where he raped her. This evidence strongly suggested not only that the rape was foreseeable to appellant (see *ibid.*), but also that appellant and Santiago executed a concerted plan to rape women at the spa (see *Nguyen*, *supra*, 21 Cal.App.4th at p. 533).

Moreover, evidence of the 2009 robbery showed that appellant had committed a similar crime in the past, targeting a prostitute for robbery and forcibly removing one of the victims' clothing. This evidence supported an inference that at Central Spa, too, appellant intended to subject victims to unwanted sexual acts and thus that Santiago's commission of rape was reasonably foreseeable to him. (See *Yeoman*, *supra*, 31 Cal.4th at p. 122; *Nguyen*, *supra*, 21 Cal.App.4th at p. 535.) Accordingly, the evidence was sufficient to support appellant's conviction of Emma's rape.

4. *Gang Enhancements*

The jury found all but one of the gang allegations to be true. Section 186.22, subdivision (b)(1), provides a sentencing enhancement for felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." Thus, the prosecution must prove that the underlying felonies were "'gang related'" and that the gang-related offenses were committed "'"with the specific intent to promote, further, or assist in any criminal conduct by gang members."'" (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484, italics omitted.) Appellant contends the evidence was insufficient to establish either prong of the gang enhancement. Here, too, we conclude that substantial evidence supported the jury's verdict.

First, Officer Rodriguez's testimony, along with the circumstances of the offenses, was sufficient evidence that the crimes were gang-related. An expert may properly "express an opinion, based on hypothetical questions that track[ ] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).)

In response to a hypothetical tracking the facts of the crimes at Central Spa, Rodriguez opined that the offenses were committed in association with and for the benefit of the gang. Appellant and Santiago were both members of the same gang. (See, e.g., *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367 ["Committing a crime in concert with known gang members can be substantial evidence that the crime was committed in 'association' with a gang"].) Victim description suggested that appellant was older than Santiago. According to Rodriguez, committing crimes with a younger member benefitted the gang by training the younger member. Rodriguez testified that the 18th Street gang commonly "taxed" prostitutes and illegal businesses because such victims were less likely to contact the police. While appellant notes that the crimes were not committed in 18th Street territory, Rodriguez testified that the spa was on the edge of territory claimed by one of 18th Street's chief rivals, and that committing a crime in rival territory increased the gang's status. This evidence was sufficient to support the jury's finding that appellant committed the crimes in association with and for the benefit of the gang.[5] (See *Vang*, *supra*, 52 Cal.4th at p. 1048.)

---

[5] The cases appellant cites in support of his argument that the evidence was insufficient to support the gang enhancements, *People v. Ochoa* (2009) 179 Cal.App.4th 650 and *People v. Ramon* (2009) 175 Cal.App.4th 843, are readily distinguishable. In *People v. Ochoa*, the defendant was not accompanied by a fellow gang member and the crime was not committed in rival-gang

(*Fn. is continued on the next page*.)

As to the second prong of the gang enhancement, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.) As discussed, the evidence showed appellant committed the crimes with a known member of the same gang. This was enough to show that appellant had the requisite specific intent. (See *ibid.*) In sum, substantial evidence supported the jury's findings on the gang enhancements.

C. *The Trial Court's Comments During Jury Selection*

1. *Background*

Appellant claims the trial court misinstructed prospective jurors on the presumption of innocence. Shortly after the start of voir dire, the trial court made opening remarks, introducing the basic concepts of the presumption

---

territory. (*People v. Ochoa, supra,* at p. 662.) In *People v. Ramon*, there were no facts linking the crimes at issue to a crime likely to be committed by the gang and thus nothing to support the gang expert's opinion that the crimes were gang-related. (See *id.* at p. 853 ["The analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang"].) By contrast, here, the evidence showed that appellant committed the crimes with a fellow gang member, on the edge of rival-gang territory, and Rodriguez testified that 18th Street commonly "taxed" businesses such as Central Spa.

of innocence and the burden of proof to a panel of prospective jurors. The court told the panel the presumption of innocence was like "a cloak of innocence" over the defendant, lasting "throughout the entire trial." It described the procedures of a criminal trial and told panel members it would provide jury instruction at the close of evidence. The court then stated, "[I]t's not until I actually have the twelve jurors who are selected go into the jury room does that cloak of innocence get lifted."

As to the burden of proof, the court explained that it was the prosecution's burden to prove appellant guilty beyond a reasonable doubt, and that the defense was not required to present any evidence. Appellant did not object to the court's remarks, and it is unclear whether any of the panel members who heard them were selected to serve on the jury.

After the close of evidence, the court instructed the jury on the burden of proof and the presumption of innocence under CALCRIM No. 220: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. . . ."

2. *Analysis*

Appellant argues the trial court's statement that the presumption of innocence would be "lifted" when jurors began deliberations violated his constitutional right to a fair trial. As appellant points out, "the presumption of innocence continues not only during the taking of the testimony, but during the deliberations of the jury, and until they reach a verdict." (*People v. Arlington* (1900) 131 Cal. 231, 235.)

Respondent argues that appellant has forfeited the issue by failing to object below. We agree. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 759 [challenge to court's comments during voir dire forfeited by failure to object].) While appellant cites section 1259 for the proposition that no objection is necessary to preserve a claim of erroneous jury instructions for review, the court's comments during voir dire were not jury instructions. A challenge to such comments constitutes a claim of judicial error subject to forfeiture. (See *ibid.*; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1357 (*Seumanu*) [challenge to court's explanation of CALJIC No. 8.88 during voir dire was claim of judicial error requiring timely objection].)

Moreover, even if appellant had preserved his challenge to the court's comments, he would fail to establish reversible error. A trial judge's erroneous comments during voir dire will lead to reversal only if it is "reasonably possible" that the error affected the verdict. (*Seumanu*, *supra*, 61 Cal.4th at p. 1358.) "'[A]s a general matter, it is unlikely that errors or misconduct occurring during voir dire

questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct "prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings . . . ."'" (*Ibid.*, quoting *People v. Medina* (1995) 11 Cal.4th 694, 741.)

We perceive no reasonable likelihood that the court's comments misled jurors to think that the presumption of innocence expired when they began deliberations. Though the court's statement that the "cloak of innocence get[s] lifted" when the jury begins deliberation was incorrect, the court made clear that the prosecution had the burden to prove appellant's guilt beyond a reasonable doubt, and that the defense was not required to present evidence. And by informing prospective jurors that it would provide formal jury instructions after the close of evidence, the court also indicated that it was speaking informally. After the close of evidence and shortly before the jury began deliberations, the court properly instructed the jury under CALCRIM No. 220 on the presumption of innocence and the burden of proof. Accordingly, we find no reasonable possibility that the court's comments affected the verdict. (See *Seumanu*, *supra*, 61 Cal.4th at p. 1358 [where trial court informed potential jurors they would receive formal jury instructions if chosen to serve and later properly instructed the jury, any error in court's comments during voir dire was harmless].)

D. *The Prosecutor's Closing Argument*

1. *Background*

Appellant argues the prosecutor committed misconduct during closing argument. In discussing the gang allegations during the initial portion of her closing argument, the prosecutor argued the crimes were committed at the direction of the gang: "[Appellant] was certainly directing some of this 'cause he's the one who did it before. He's the guy with the plan. He's directing the younger gang member around and what to do." Appellant did not object.

In her rebuttal, the prosecutor invited the jury to play the role of the detective. She described some of the evidence introduced at trial and then stated: "And now we're looking at [appellant] . . . and we find out that he has committed a [nearly] identical crime a few years ago." Appellant did not object.

After closing arguments, during an unrelated sidebar, defense counsel complained that the prosecutor's comment in rebuttal improperly relied on a matter not in evidence. Counsel noted there was no evidence the detective in this case discovered that appellant had committed another crime in the past. He further argued that the comment violated the court's ruling that evidence of the prior crime could not be used to show that appellant was the perpetrator of the crimes at Central Spa. Regarding his failure to object immediately after the prosecutor's comment, counsel stated, "[The prosecutor] was moving on to something else before I really realized what she had said, and I felt that at that

point in time it was too late for me to object and ask for a jury instruction . . . ." He added, "I think it's maybe too late for anything to be done."

The trial court agreed that the evidence did not support the prosecutor's comment and invited defense counsel to suggest remedial measures. Defense counsel subsequently moved for a mistrial. The trial court denied the motion for a mistrial but stated that it was willing to admonish the jury. Defense counsel declined the court's offer.

2. *Analysis*

Appellant claims the prosecutor's comments were improper, constituted reversible error under state law, and violated his constitutional right to due process. He contends the prosecutor urged the jury to conclude appellant was guilty based on his criminal predisposition.

A prosecutor's conduct violates a defendant's federal constitutional right to due process when it amounts to a pattern of egregious misconduct that infects the trial with unfairness. (See *People v. Hill* (1998) 17 Cal.4th 800, 819, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046.) A prosecutor's conduct that does not render the trial fundamentally unfair will constitute misconduct under state law only if it involves """"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""" (*Ibid.*)

Respondent argues appellant has forfeited his claims by failing to make timely objections and seek admonitions below. We agree. "[I]n order to preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection to the alleged misconduct and request the jury be admonished to disregard it." (*Seumanu*, *supra*, 61 Cal.4th at p. 1339.) "If an objection has not been made, '"the point is reviewable only if an admonition would not have cured the harm caused by the prosecutor's misconduct." [Citations.]'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) Only in extreme cases will a prompt admonition fail to remove the effect of a prosecutor's improper comment. (*People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 312 (*Fitzgerald*).)

Appellant did not object to the initial part of the prosecutor's closing argument; his objection to her rebuttal (after the conclusion of closing arguments) was untimely, and he did not seek admonitions for either of the contested comments. On appeal, appellant asserts that defense counsel did not request an admonition after the conclusion of closing arguments because he "believed it would call attention to [the prosecutor's comment in rebuttal]." Regardless, we conclude a prompt objection and admonition following the prosecutor's comments would have cured any harm. The prosecutor's contested comments were isolated and relied primarily on the evidence that appellant committed the 2009 robbery. They were not so egregious or misleading that a timely admonition could not have

remedied them. (See *Fitzgerald*, *supra*, 29 Cal.App.3d at p. 312; *People v. Carrera* (1989) 49 Cal.3d 291, 320 [prosecutor's misstatements "were not so extreme or so divorced from the record that they could not have been cured by prompt objections and admonitions"].)

Moreover, the court instructed the jury that the attorneys' statements were not evidence, and that it could not rely on evidence of the 2009 robbery to conclude that appellant committed the current offenses. Together with these instructions, a specific admonition would have ensured that the jury gave no weight to any improper comment by the prosecutor. (See *People v. Dennis* (1998) 17 Cal.4th 468, 519 [where jury was instructed that counsel's questions and statements were not evidence, admonition could have avoided any potential harm from alleged misconduct].) Consequently, appellant has forfeited his claims of prosecutorial misconduct by failing to seek admonitions. (See *Seumanu*, *supra*, 61 Cal.4th at p. 1339.)

E. *The Firearm Enhancement*

Appellant claims that we must remand the case for the trial court to exercise its discretion to strike his firearm enhancement under section 12022.53. Respondent agrees, as do we. Appellant's sentence included a 10-year enhancement under section 12022.53, subdivision (b). At the time of appellant's sentencing, prior to the enactment of Senate Bill No. 620, a trial court could not strike firearm enhancements under section 12022.53. (See former

§ 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."]; Stats. 2010, ch. 711, § 5.) However, effective January 1, 2019, Senate Bill No. 620 replaced the prohibition on striking section 12022.53 firearm enhancements with the following: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)

Senate Bill No. 620 applies retroactively to nonfinal judgments, such as appellant's. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.) Under such circumstances, an appellate court must generally remand for the trial court to exercise its newly granted discretion. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) Accordingly, we vacate the sentence and remand the matter for the trial court to exercise its discretion whether to strike the enhancement. We express no opinion how the court should exercise its discretion on remand.

DISPOSITION

The convictions are affirmed, the sentence is vacated, and the matter is remanded for resentencing consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

DUNNING, J*.

---

*Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.